

**AMESBURY ZONING BOARD OF APPEALS
CITY HALL AUDITORIUM
62 FRIEND STREET
THURSDAY, APRIL 24, 2014 @ 7:00 P.M.**

MEETING WAS CALLED TO ORDER AT 7:05 P.M.

PRESENT: Matt Sherrill, Chair, David Haraske, Sharon McDermot, Donna Collins, Bill Lavoie.

ABSENT: Olyce Moore, Bob Orem

ALSO PRESENT: Denis Nadeau, building inspector, Sue Yeames, Recording Secretary.
Minutes transcribed by Paul Bibaud

MINUTES:

MARCH 27, 2014 (MS, DC, DH, OM): No Minutes Submitted.

Request for an Extension of Variance – Holly Braddy, 252 Main Street.

Holly Braddy seeks an extension to the Variance which was approved in May of 2012. Due to unseen circumstances, she will not be able to start the project until the following year (2015) and asks if it would be possible to extend this Variance approval.

Matt Sherrill: Normally, what we do is consider a one year extension to the Variance, so that would put her into May 24, 2015 if we approve the extension.

No discussion from the board on this request.

Motion was made by Matt Sherrill to vote for a one year extension on this variance to May 24, 2015. Voting went as follows:

Bill Lavoie: Yes.

Donna Collins: Yes.

Matt Sherrill: Yes.

Sharon McDermot: Yes.

David Haraske: Yes.

Extension is approved for one year.

Patricia Jones is seeking a **Variance** under Amesbury Zoning Bylaws Section VI, Table of Dimensional and Density Regulations zoning relief to support construction of an on-ground pool at **52 Arlington Street**, Amesbury, in an R8 Zoning District, Precinct 3.

Greg Broyer, owner of Precision Pool Construction, 83 Haverhill Road, Amesbury: What we would like to do is build an in-ground pool off to the side yard of the property. This is literally the only spot on the property that can house a pool. The back is unbuildable. The site of where the proposed pool is was filled. Off to the side of this yard is big and you can see the tree line if you are standing on it. So there are no properties that would be viewing her except for one, right at the top of her driveway looking down. I know there were 46 abutters to the property to the property. Only one other house can see this in the area. Obviously, no one wants a pool in their front yard. Even that would be too small for this. So the only logical spot on this property for an in-ground pool is off to the side there. I know there was a question about how far off the house foundation. I think we can get the ten feet. If not, I think I think I put on your proposed eight feet, but it's a poured foundation. I know the law was put in place because of stone

foundations in the older houses. But this is a newer house with a poured foundation, so it should not make too much of a difference either way.

Matt Sherrill: Denis, I heard him mention something about 8 feet. Is that the closest that you would allow this to be?

Denis Nadeau: What the code calls for is ten feet. The reason for that is like he said, the stone foundations in older homes. This is a concrete foundation, so eight feet will be fine. I've given waivers on that before.

Greg Broyer: And our foundation is concrete also, so you'd never have any flex to it either way.

Matt Sherrill: So I did look at the property, and it does appear to be really tight there. It says you're putting in a 16 by 32 foot pool? I assume it is possible. Does it leave any room at all on the sides of the pool? I guess my concern would be is that normally you think of an in-ground pool, you think of kids running around, running around the pool, jumping in the pool as kids love to do. Is there going to be an apron, a fence, any protection against the kids falling off the hills on the backsides of both sides of what this pool would be?

Greg Broyer: First of all, our plan for the fill coming out of the hole is that back corner toward the back of the house where it gets tight would be filled. That is where all the fill will go. There's going to be at least a four foot apron around it with concrete, and that whole section will be fenced in. All of that has been addressed. If need be, if we had to shrink the width of the pool a bit to make it safer, to be fenced in. That's an easy thing to do.

Matt Sherrill: A fence, I don't know if by law you have to have it, but I know insurance companies like to ...

Greg Broyer: By law, you do have to have a fence for in-ground pools, to be four feet high.

Matt Sherrill: Any questions from the board? (board answers no). Are you going to be doing any landscaping, or anything along that line? Or is it just apron and fence.

Greg Broyer: They may want to put a shed there. That is to be determined, once we get approval. We'll stake out the pool and have a better idea where things like that are going to go and the layout of the fence. I can put that on the proposal
(Denis Nadeau spoke inaudibly from his seat in the auditorium).

Matt Sherrill: So you're not going to be anywhere near any wetlands...no, you aren't. One of the questions that we have to talk about is: What is the substantial hardship? Basically, what you're saying is that due to the topography of the land that this house sits on, this is really the only place it can be put.

Greg Broyer: Exactly.

Matt Sherrill: Any other questions from the board? (no). Are there any abutters here that wish to speak about this? (no). Then I will entertain motion to close and discuss this application.

Motion was made by Donna Collins to close and discuss. Motion was seconded by Sharon McDermot.

Matt Sherrill: 1.What is the substantial hardship? The lot topography limits the place to put a pool on this property. Can only be on the right side.

2. Does this effect the district? No.

3. Would there be substantial detriment to the public good if this was granted? No effect.

4. Does this stray from the intent of the bylaw? No.

Stipulations? No.

Motion to close and vote was made by Sharon McDermot. Motion was seconded by Donna Collins. Vote went as follows:

Bill Lavoie: yes.

Donna Collins: yes.

Matt Sherrill: yes.

Sharon McDermot: yes.

David Haraske: yes. This application has been approved.

Jon Davey, 71 Sullivan Street, Berwick, Me. has filed an Application for an Appeal of the Code Enforcement Officer's **Cease and Desist Order**

issued on January 17, 2014 for the property on 77 Elm Street, Amesbury, in the Central Industrial District, Precinct 2.

Matt Sherrill: Mr. Davey is not here, so we will not be able to vote on his application for an appeal of the code enforcement officer's CEASE AND DESIST order.

We do have some information that was given to us by the building inspector, and I assume we can review that and if he shows up next time, we can speak with him. So Denis, Mr. Davey has not shown. We don't have to take any action, right? We asked him ...he was on the agenda last meeting, and he was here. But because there was only four of us, he elected to come back to this meeting. So if he doesn't show up this month, it doesn't create any issues or conflicts because he's just simply asking us to consider an appeal of your decision, correct?

Denis Nadeau: (spoke from his seat in the auditorium and it was inaudible).

From notes of Sue Yeames: Mr. Davey has continued to work on the property. Change of use hearing. Outside trash everywhere. Have 90-120 days to hear his appeal. He is creating artist studios – no occupancy permits. Any changes of use have to come back before the ZBA. He needs plans to show what he is doing. If he can prove that the use has not changed, they can lift the CEASE AND DESIST ORDER. Evidently, people are sleeping there. Even with the CEASE AND DESIST ORDER, he is continuing to do what he likes. Will ask Joni to send him a certified letter saying this is his last chance. In violation of zoning ordinance. He needs to show up next month. Will continue.

Rich and Kim Sandler, 79 Elm Street, abutters: trash dumped between the buildings, loud music, it impacts them as abutters, all the trash brings a risk of rodents, fire and health risks. Total disregard for the zoning laws. They want to know when it will stop. They need to see action taken. Discussion of actual owners – listed on property card.

Ask for Joni to send a certified letter asking Mr. Davey to be here next meeting for his last chance before the board. If he is not here, the building inspector will take action.

Matt Sherrill: So we have 90 to 120 days left to hear it then. So we'd be ok until May. My question for you, Denis, is the previous tenant at 77 Elm Street was an antique / collectible / retail open to the public business. What is he putting in there?

Denis Nadeau: Basically all kinds of artist studios (again speaking from his seat in auditorium). But it was originally stipulated that any changes in use of the building had to come back before the ZBA.

Matt Sherrill: So if he came to us with a plan that showed that this is still going to be a retail type situation and this is how it is going to be laid out and this is what I'm going to be doing, and the board feels comfortable that it is not a change of use, then we could in theory overturn your CEASE AND DESIST.

Denis Nadeau: Right. But it doesn't matter what you say to him, he's going to give you an excuse saying he'll do it. He wants to have a furnished place upstairs with nice furniture. He's been changing the layout. People are in there sleeping on mattresses. Somebody put in a shower, and there was a toilet and a tub in the other room, but just like the mattress with a sheet on it, he didn't put it there. Guess it was a coincidence that it was there.

Matt Sherrill: Well, even if we uphold your CEASE AND DESIST, it sounds like he's going to still do what he wants to do?

Denis Nadeau: (still inaudible from auditorium floor, not at podium / microphone) I've received claims from councilmen, complaints of drugs in there, without proof of it. (voice was muffled...all but inaudible).

Matt Sherrill: Part of me doesn't really want to extend this out, but, I think in good faith that we're going to have to, only because we only had 4 board members at the last meeting and he was here. Now we have the complimentary five members here, but he is not.

Denis Nadeau: I feel like I'm going to shut him down tomorrow, if he is going to take it to court.

Matt Sherrill: I think we have to give this guy one more month, and that's it. If he doesn't show up next month, then we're basically upholding the CEASE AND DESIST ORDER.

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**Reconvene the meeting as Mr. Davey has shown up.** He is here before the board to appeal the CEASE AND DESIST ORDER issued on Jan. 17, 2014 by the building inspector for the property located at 77 Elm Street, Amesbury, in the central industrial district, precinct two.

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Mr. Jon Davey: The Cease & Desist was issued. There are two issues going on.

1. there has not been retail use on that property since August of 2011. it has been 2 years and 8 months. The last retail was MILL 77. IE: By section 9, 40 A. That has expired. Anything over two years unutilized subject to building delay.
2. It's not utilized. Hasn't been for well over 2 years. So I don't have to comply.

There are a lot of uses allowed in that zone. Example: a school. There are conditions for a school. If I was a school, Denis would kick my butt. I would need everything done under the sun. But I'm not a school. Hence, I do not have to comply with conditions, because it is not utilized. The retail is not utilized. In fact, it is vacant. So you can kick 4, 2, and 3 out, because it doesn't apply. It's expired, it's not utilized, there you go. I don't know what else to say?

Matt Sherrill: Sounds good to me. Denis, I'd like to hear your response to his saying that because it hasn't been utilized for two years and eight months, it voids anything that he has to comply with.

Denis Nadeau, building inspector: First of all, any use that expires, if the use expired, then you try to go back in there with that use, then you'd have to go back through the site plan conditions all over again. It means all your rights have expired. Not that the use doesn't have to be done. I have my paperwork here, I've given you my things. One of the issues was that this is a change of use. According to the first thing they came in with was that it was going to be an artisan use. Whether it's an artisan business or an artisan live in, according to our zoning bylaws, an artisan business is not allowed in an IC district. This is an IC district, strictly written. It is in the table of uses under business. It is not an allowed use. I've never seen plans, but Mr. Davey told me it was going to be artisan use. On the computer, listed on the computer was artisan. Listed on the front

windows of the buildings, it is advertising artist studios. So my opinion the use was an artists' studio. When I went in there for the first time, there was new areas made, doors built, no permits, no licensed contractor, no electricians, no nothing. People are living in there. I went into the one room, they had a bed in it, all made. Comment was that they're not sleeping here. Went into Mr. Davey's room, there was a mattress leaning against the wall, with a sheet on it. Comment was "nobody is living here." You can't live in a commercial building that is not designed for living. I explained to Mr. Davey what was going on, and he informed me he was going to get plans. I told him people had to move out of there until such time that we had the proper plans, the sprinkler system was up and running properly, he did get the sprinkler system updated and repaired. There was a bunch of sprinkler heads that had been painted. All those got switched out. But the issue there is the use of the building. It was a retail building on the first floor. The retail moved out. The artist business is not allowed in there. If it was allowed in industrial, it is a Special Permit from the Planning Board, which would require site plan review and a Special Permit. When this was there, there was a decision from the ZBA, they went for a Variance to get use of parking that was over 300 feet away. In your conditions, one of your conditions in the paperwork I gave you on number 4, it says "any change or use in the building shall require site plan review from the Planning Board to ensure adequate loading, handicapped parking, lights, signage and other building improvements that are appropriately addressed. That came out of your board's decisions on the stipulations that you put in on this project. I was in there today, and there was a lady that told me she was moving in there. I went into where she was moving in, there's no permits for this room, there is no heat for this room. Again: no occupancy, no application for an occupancy permit, and no drawing showing me what they are doing in this building. They are in violation of the building code, and in violation of our zoning. As you know, I've sent Mr. Davey letters...there is trash in the backyard, they picked up a lot of it, but there is still a lot more. It's gamey. I don't know what else is in the building, but I know there is a band in there. That is not retail. (Mr. Davey interrupts from auditorium seat).

Retail, the thing you have to understand is, artisan business is not allowed in an IC district. Any comments you want, the use is not allowed. Nobody has come to me with a plan showing me a woodworking shop, which he stated he wanted to put in there. Show me what the use is. There is no plan. There is no design. There is no proper means of egress plan. There is no layout. I don't have anything to allow this or anything to issue an occupancy permit. Under your zoning, section 10, paragraph H: "requires occupancy permit before any building is occupied." That's another zoning violation of the bylaws. I'm asking the board to back up my CEASE AND DESIST ORDER, which I will apply again until he meets the proper requirements of proper plans designed by the people, a licensed contractor pulling a permit, and the proper heat and whatever needs to be done, and that is an allowed use in this business. If it's a change of use, according to the Planning Board, it is going to have to go as a minimum of a site plan review, and maybe a Special Permit. It depends on the use that this is determined to be. It's not up to me to determine the use. It's up to me to determine that this is not a retail use. He's was saying the retail was only going to be on the first floor. When they came to you for that extension of the parking, the reason for that was, they were moving to the second floor. So it doesn't matter. The use... until we have a set of plans and the proper things and the proper occupancy permits in place, This building is in violation of the Amesbury Zoning Bylaws.

Mr. Jon Davey: I disagree. Clearly, Denis and I disagree on many issues.

There are many issues brought up where I also disagree with, which were extraneous to the Cease & Desist. The Cease & Desist is very specific, and that's what I'm here to address. That is

what the law states. That is what I'm here to address. If however he is unhappy with X, Y, and Z, then he can issue a Cease & Desist on that... but he didn't. The issue is Cease & Desist on certain premises. That's number one, and that is what I'm here to address. Everything else is irrelevant until he issues a Cease & Desist on it, which I'll address. The first part of this is simple. The Special permit was for the first floor. It's not a Variance, it was a Special Permit. You have it in front of you. It expired after two years. It's two years and eight months now... expired. It was unused for that period of time. It is expired. End of story. It was for the first floor only. First floor is vacant! Empty. Ghost town. Denis wants to complain about the dumpster, the electric, you name it. Whether the current tenants, which I completely disagree with Denis on this issue, which I happen to believe they are allowed by right, then he can issue a Cease & Desist on that, or go to the Planning Board, which by the way, the group of artists are doing, not me. And I call them artists. By the way, being an artist, in and of itself, and Denis is correct in this, Amesbury zoning code dictates that an artist has to go for a Special Permit. However, being an artist and having talent does not preclude you from being light production / light manufacture. He's permitted, given occupancy certificates, to identical uses in the last two years. We are here about the first issue. That is the Cease & Desist that he issued, I'm here to address it, it's unutilized, it's expired. That is the only issue we are here today for. Extraneous issues aside, which, if you want to address it, we'll address it. Denis and I do not necessarily agree on many issues, clearly. However, we are here today for one issue only. If he wants to issue a Cease & Desist, and I'm not in compliance for any number of reasons, he can do so. I'll show up, I'll bring my people in, I'll pull the book on the property. I'll show the occupancy certificates for identical uses. That's all I have to say.

Matt Sherrill: I just want to be clear in understanding what your reasoning is. Your logic is that, because it is expired and over two years...

Mr. Davey: It's a state law.

Matt Sherrill: ... that the permit has expired, and now because the permit has expired, you feel as though you can do whatever you want.

Mr. Davey: No, no, not even by a long shot.

Matt Sherrill: I think that is what you said.

Mr. Davey: I said I don't have to comply with the conditions of the special permit, not a variance. Because A. it is not utilized.

Matt Sherrill: What is your argument against that retail is not an allowed use in an IC district?

Mr. Davey: It's not an allowed use.

Matt Sherrill: So what are you doing about it?

Mr. Davey: It's vacant.

Matt Sherrill: I know, but you are going to use the building, correct?

Mr. Davey: Again, this is an issue before us, but the artists are going before the Planning Board, as a group, as a co-op, because I'm stepping out of this property. I'm getting out of Amesbury. But I'll see it through to a certain point. The artists themselves, who shall have equitable right of title, allowing them legally to go before the Planning Board, and that's a stipulation of the Planning Board, a state law and all that. They need right of title, if not actual ownership. They are doing that. They are forming a corporation, the whole deal. That is their issue. I will walk them through it, I will stand by the side. But I'm stepping out after that. I don't want to cross the town line again. Retail isn't in use: they would love to use retail. I would love it. But that is up to the Planning Board and them. The issue before us tonight is that I don't comply. I'm saying it is expired. I'm saying it is not utilized, so conditions don't apply. This is similar to a school in this

district, which is allowed. I don't have to comply with the building codes of a school because it is not a school. I don't have to comply with conditions that are not utilized. That is not utilized. Retail has been vacant for about 20 months. It's expired by state statute. That is what we're here for. If Denis has other issues, then let's talk about them. But the issue before us is this particular Cease & Desist. That is my rebuttal. Denis may rebut me. We do plan to appeal before a judge, if we get a negative decision. Hands down, all day, a thousand times over, we're appealing. The artists, as they've formed a legal corporation which will not include me, to go before the Planning Board.

Matt Sherrill: Any other questions from the board? (no board questions).

Mr. Davey: Please. I'll answer anything.

Denis Nadeau: Mr. Davey refers to the notice of Vacate and Cease operations. In my first paragraph, I state that it was done for the retail. In the second paragraph, it goes on to say "therefore, please be aware that an occupancy certificate cannot be issued without approval from the Planning Board as stated in the Amesbury Zoning Bylaws, Section 5, paragraph B, Table of Use regulations. Under that, it is telling him that they cannot issue it because it is in violation. In that section, he cannot be in there until he is approved by the Planning Board for an artist studio. He knows he has to go through the Planning Board. This Cease & Desist, I didn't put in there a Cease & Desist on all the code violations, because I didn't think it was necessary. I figured the zoning was going to take care of it. I gave him his right to appeal, but in it I stated that this building must be vacated. After he appealed it, I let him stay in it until such time that the appeal is heard. But this clearly stated that any change to an approved special permit or site plan would be considered a modification. Just because he's only saying it is the first floor, the whole building was under special permit, and there was no occupancy for any uses he has, and I can't issue him an occupancy until such time that he goes through the Planning Board. That was also notice in the Cease & Desist. He has not gone through the Planning Board, so the Cease & Desist should be upheld...because he has not done what was required in this letter. As I explained, anything that expires means that he can't do it again. You got a special permit to do the retail. They gave you special permission to allow you to do the retail. When you abandoned that use or not do it, I think our zoning is two years, but it might be one year, then that means that your special permit is no longer any good. He's correct. But it doesn't mean you can use the building for any other use you want to use it for.

Mr. Davey: The permit has expired. Any other violations, just write it up. I'll argue it. I've met with the town planner, who is part of the planning board. I've done that. I initiated the process. They're doing legal work. If he has an argument with that, then we'll deal with it. The issue here before us is the permit which has expired, and Denis just agreed to it. It's expired. End of story. State statute. It's over. He's saying I don't have the right to put in people who are not allowed in there via zoning. He's correct. I don't. I do, however, have a right to put people in as of right that fulfill the zoning requirements. Those parties do. Again, that's not a part of what we are here for. That's a different issue. The issue before us here is "this Cease & Desist on the first floor, which was zoned retail via the special permit, which has not been utilized in 2 years 8 months. I don't have to comply. I'm not utilizing it, and it is expired. It's an allowed use, not a mandated use. It's expired. Denis just agreed with me. It's expired. I don't have to comply. What I do have to comply with is that it's an IC zoning, light industrial. Those have allowed uses. He disagrees with one of the tenants, call them before you. I'm happy to bring them forward. I don't believe, and this is a tangent again, that because someone has talent that precludes them from falling under light production. It does not. You have an ambiguity in the law, but that is not why we're

here. I have not put in painters who only paint. Many people are not allowed in that property until the special permit is allowed that the artists are going for. They are not allowed. That's it. The wood shop, the furniture refinishing, the lady who does re-upholstery, framing. Again, it's extraneous. The permits expired. No need to comply. We need to comply with zoning, which was not part of the Cease & Desist order. I'm here to deal only with the Cease & Desist. If he has other issues, let him follow up the Cease & Desist on those issues. No problem. If someone has to leave because they don't comply, prior to a special permit hopefully being allowed, hey, that's life. But I'm here to deal with this specific Cease & Desist on an expired permit that is not utilized, much as the property is not a school.

Matt Sherrill: Would the gentleman in the audience like to come up and speak on record as to why you are here?

Richard Sandler, owner of 79 Elm Street. Our big concern is the fact that there is a trash dump between the buildings, and it has been like that several months and hasn't been corrected. That's my big concern right now. There have been several parking issues, but that's been a secondary issue that we'll deal with. Right now, it's a public safety issue with the fire hazard and health hazard, and it just needs to be addressed, and it hasn't been.

Mr. Davey: He's right. I've had two 10 yard dumpsters there. It became an illegal dump site, to be honest. People from N.H. dumped stuff. We're emptying it out. We're almost done. It is disgusting. I have a four yard dumpster there for weekly pick up. I expect the remainder of the trash to be resolved. There was a lot of trash. We're doing it as funds allow. He's right.

David Haraske: Have you ever provided Denis with a site plan?

Mr. Davey: Absolutely. A registered architect, licensed, egress, the distance. He's got that. Yes, it was a licensed MA architect who dealt with the egress issue.

Matt Sherrill: OK. Thank you. So we have in front of us an appeal of the code enforcement officer's Cease and Desist Order. How does the board feel? Any comments?

Olyce Moore: Seems they're here without (inaudible...speaking in soft voice).

Matt Sherrill: Yes, I can't see how we're going to not uphold the Cease & Desist order. Without the occupancy permit, you just can't let people in.

David Haraske: Doesn't matter what the site use is, without the occupancy permit, you can't be in there and doing business.

Bill Lavoie: If he is knowingly breaking the law by letting people in there, then I don't see how we can go against the appeal.

Matt Sherrill: So if we vote no, we are voting "no, we are not allowing the appeal of the Cease and Desist Order and that the Cease and Desist order is upheld by a no vote. Yes vote would mean you are allowing the applicant his appeal.

Bill Lavoie: No

Donna Collins: No

Matt Sherrill: No

Sharon McDermot: No

David Haraske: No

The board upholds the Cease and Desist order that was given to you by the code enforcement officer.

Mr. Davey replied from his seat in the auditorium, but his comments were muffled and inaudible.

The June meeting will have to be changed to June 19. There are conflicts for June 26 meeting.

Motion was made by Sharon McDermot to adjourn. The motion was seconded by Donna Collins. Vote was unanimous.

Meeting was adjourned at 8:10 P.M.